82-1633

NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES;
and RICHARD URQUHART, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Fourth Circuit has created a "special rule of reason" as an affirmative defense which is available to persons whose participation in the "planning" of health care facilities constitutes classic *per se* violations of Section 1 of the Sherman Act. According to the Fourth Circuit, such providers are protected from antitrust liability if (a) their activities are "undertaken in good faith", and (b) the "actual and intended effects" of their activities are among the consequences "envisioned" by federal statutes that encourage and fund the planning of health care facilities. The Questions Presented are:

1. Whether a "special rule of reason," premised largely on the defendants' good faith, should be an affirmative defense to a proven horizontal market allocation conspiracy and a proven concerted refusal to deal, offenses that are admittedly *per se* violations of Section 1 of the Sherman Act.

2. Whether there should be an affirmative defense, analogous to the special rule of reason under Section 1, to a proven attempt to monopolize and a proven conspiracy to monopolize in violation of Section 2 of the Sherman Act.

3. Whether provisions of certain federal statutes that "envision" and "encourage," but not "mandate," private participation in the planning of health care facilities are in such "derogation" of the Sherman Act that planning activities which otherwise constitute *per se* violations of the Sherman Act are protected from the "normal operation of the antitrust laws."

[cont'd]

Petitioner respectfully reserves the right to argue the following questions in the event certiorari is granted on the above questions. These questions are not advanced as reasons why certiorari should be granted.

4. Whether, as a matter of law, a jury in a civil antitrust case must be presented with *more* than a preponderance of the evidence before it is permitted to find that a public official participated in a conspiracy in violation of the antitrust laws.

5. Whether conduct which abuses state adjudicatory and judicial processes and which is part of a larger conspiracy to exclude competition from a market is protected from the antitrust laws under the *Noerr-Pennington* doctrine.

STATEMENT OF RELATED COMPANIES UNDER RULE 28.1

At the time of the acts which gave rise to the causes of action in this action, petitioner Hospital Building Company ("petitioner" or "HBC") was a wholly-owned subsidiary of Charter Medical Corporation ("Charter"), a publicly held company that owns and manages hospitals and other health care facilities in many states. The stock of petitioner has since been sold by Charter to the Hospital Corporation of America ("HCA"), and petitioner is presently a wholly-owned subsidiary of HCA. By contract, Charter retained the right to direct this litigation and the rights to all proceeds from this litigation; HCA has no financial interest in this matter.

Petitioner does not have any partially or wholly-owned subsidiaries. Petitioner's only current affiliates are wholly-owned subsidiaries of HCA; its only prior affiliates are wholly-owned subsidiaries of Charter.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Hospital Building Company respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered on October 19, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Appendix A) is reported at 691 F.2d 678 (1982). The Court of Appeals' order denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B) is unreported. The District Court issued no opinion; its unreported order entering judgment for petitioner based on the jury's verdict is reproduced as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 19, 1982. *See* Appendix A at 1a. Petitioner HBC timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied on January 7, 1983. *See* Appendix B at 23a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1 (1976 and Supp. V 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .[1]

STATEMENT OF THE CASE

A. Proceedings Below.

This case is now before this Court for the second time on a petition for writ of certiorari to review a decision against petitioner by the United States Court of Appeals for the Fourth Circuit.

[1] Section 4 of the Clayton Act, 15 U.S.C. §15 (1976 and Supp. V 1981) provides a private right of action to "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws . . . ."

Petitioner filed this action on October 10, 1972, in the United States District Court for the Eastern District of North Carolina for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1976). The District Court dismissed the case for failure to state a claim affecting interstate commerce. A panel of the Fourth Circuit affirmed the District Court *per curiam;* rehearing *en banc* was granted, and the entire court affirmed on a 5-3 vote. 511 F.2d 678 (1975). This Court granted certiorari, unanimously reversed the Fourth Circuit, and held that respondents' alleged anti-competitive conduct had a substantial effect on interstate commerce. 425 U.S. 738 (1976). On remand, the case was tried for six weeks before a twelve person jury which returned a verdict for petitioner on all counts and awarded damages of over 2.4 million dollars before trebling. Motions for a new trial and a judgment notwithstanding the verdict were denied by the District Court. Respondents thereafter appealed, and the Fourth Circuit reversed the District Court's rulings and the jury's verdict. 691 F.2d 678, Appendix A. The Fourth Circuit denied HBC's Petition for Rehearing and Suggestion for Rehearing En Banc without opinion.

B. **The Parties.**

Petitioner, Hospital Building Company, is a corporation organized under the laws of North Carolina. Petitioner owned and operated Mary Elizabeth Hospital ("Mary Elizabeth"), a 49 bed, for-profit hospital in Raleigh, North Carolina.

Respondent Trustees of the Rex Hospital is a North Carolina corporation which operates the Rex Hospital, a private, tax-exempt, not-for-profit hospital in Raleigh.[2]

[2] For convenience, both the Rex Hospital and the Trustees of the Rex Hospital, a corporation, will often be referred to as "Rex."

Respondent Joseph Barnes was the executive director of the Rex Hospital as well as a trustee of North Carolina Blue Cross-Blue Shield, Inc. ("Blue Cross") from 1960 to 1972. Respondent Richard Urquhart, Jr. was vice-chairman of the Board of Trustees of the Rex Hospital.

C. **The Facts.**[3]

Respondents and their co-conspirators[4] undertook, beginning in the late 1960's, to allocate the market for provision of general medical-surgical hospital services in the Raleigh, North Carolina, area between Rex and Wake Memorial. This market allocation scheme eventually was formalized into a document and published in the name of the Joint Long Range Hospital Planning Committee of Wake County ("Joint Committee"), an entirely private organization which received no federal or state funding.[5]

[3] References to the record on appeal are to the Joint Appendix and are cited by volume and page number to the Joint Appendix, *viz*, (VII 2855). Trial exhibits not in the Joint Appendix are cited by their numbers and preceded with a "P" or "D" to indicate the party which introduced the exhibit, *viz*, "P-1432."

[4] The co-conspirators included, among others, Wake Memorial Hospital ("Wake Memorial"), a not-for-profit hospital and the only other general medical-surgical hospital in the Raleigh market, and Blue Cross, the principal third party reimburser for medical care services in North Carolina.

[5] The Fourth Circuit erred factually when it apparently ascribed some type of official status to the Joint Committee. *See* 691 F.2d at 682, Appendix A at 3a. The Joint Committee was, in fact, a private, voluntary organization established by Rex and Wake Memorial. The Joint Committee was comprised of local citizens and controlled by representatives of Rex and Wake Memorial, and it did not meet or operate under the authority of any state or federal statute or regulation. Indeed, the Joint Committee had no more official status than would a committee comprised of representatives of General Motors and Ford who met to "plan" the long range need for automobiles. In a "long range plan" published by the Joint Committee in May of 1971 and titled "Report of Joint Long Range Hospital Planning Committee of Wake County to the Board of Trustees

The Joint Committee was formed and controlled by respondents and their co-conspirators.

Respondents' market allocation scheme, as represented in the Joint Committee's report, was threatened by Charter's purchase of petitioner in 1970 and by Charter's announcement that Mary Elizabeth would be expanded from approximately 49 general-medical hospital beds to approximately 140 such beds through construction of a new hospital. Respondents and their co-conspirators, in order to protect and implement their market allocation scheme, conspired to block this expansion and thus to prevent and eliminate competition from petitioner in the Raleigh market.[6]

The Fourth Circuit did not contest that respondents acted jointly to prevent the expansion of Mary Elizabeth or that respondents' joint conduct constituted *per se* violations of §1. However, the Fourth Circuit focused on respondents' intent and ordered a new trial to permit respondents to present a good faith affirmative defense, apparently in the belief that respondents acted only out of a desire to "plan" for the medical needs of the Raleigh community. The record is susceptible to no such interpretation.[7]

The conspiracy which is the subject of this case was

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of Rex Hospital and Wake County Hospital System, Inc.," the Joint Committee allocated, according to its "plan," all of Wake County's new bed needs between Rex and Wake Memorial. (VII 2878-2904).

[6] Respondents have never contested that the relevant geographic market was metropolitan Raleigh, *i.e.*, Wake County, North Carolina, or that the relevant product market was medical-surgical hospital beds.

[7] Indeed, the record is replete with evidence that the conspirators acted solely for their own economic self interest and that they deliberately set about to delay the construction of a facility that would have provided some of the badly needed medical-surgical hospital beds in Raleigh. (*E.g.*, III 1192-1193; IV 1496-1497; VII 2617, 2621-2624, 2648-2649, 2689-2690, 2702, 2855).

aimed directly at petitioner and, through it, the entry of Charter, an aggressive and efficient operator of for-profit hospitals, into the Raleigh market. This conspiracy was but one aspect, however, of a more general understanding among non-profit hospitals in North Carolina and their primary source of payment, Blue Cross, that every effort should be made to forestall competiton by proprietary hospital organizations. Thus, when petitioner filed for a Certificate of Need in order to proceed with construction of its new hospital, the conspirators put into operation a "primary plan" (VII 2855) to subvert the procedures prescribed by North Carolina law for the awarding of a Certificate of Need by the North Carolina Medical Care Commission ("MCC").[8]

The initial stage in the state procedure was review and consideration by the "areawide health planning council"[9] of petitioner's application to the MCC. After reviewing that agency's recommendation, the MCC was directed to consider the Certificate of Need application, to hold a hearing if it was opposed, and then to approve or deny

[8] North Carolina passed a Certificate of Need law in July, 1971, 1971 N.C. Sess. Laws Ch. 1164 §§90-289 *et seq.* Under that law, the MCC had the exclusive responsibility for determining "need." The law also permitted "areawide health planning councils" to review and comment on certificate of need applications.

[9] The "areawide health planning council" in Raleigh at the time was the Health Planning Council of Central North Carolina ("Central Planning Council"). The Central Planning Council was a voluntary organization formed in 1964. It was supported almost entirely by private funds and local government contributions although it did receive a small amount of federal assistance (II 430-431); its purpose was to provide advisory health service plans to interested entities in several North Carolina counties. (V 2155-2156, VII 2785, 2990). "Planning" by the Central Planning Council was not mandated by any federal statute, and the Central Planning Council did not have the authority to enforce the antitrust laws or impose any of its "plans." More importantly, the Central Planning Council was not authorized to, and did not, consider the competitive consequences of its decisions under the antitrust laws.

the application. If the MCC's decision was contrary to the areawide health planning council's recommendation, that agency could request the MCC to reconsider its decision.

The conspirators (who included the director of the areawide health planning council) made this procedure a device to delay and frustrate petitioner's construction of its new hospital. The conspirators' scheme included multiple abuses of the procedures for obtaining a Certificate of Need by, among other acts, misrepresentations to the MCC, the enlistment of the assistance of Christine Denson, an assistant attorney general of the state of North Carolina,[10] and the adoption of an overall course of conduct which denied effective and meaningful access by petitioner to the MCC.

When petitioner finally obtained its Certificate of Need,[11] the respondents instigated an appeal of that decision to the North Carolina courts, despite legal advice that the appeal was not likely to succeed on the merits and thus would not prevent petitioner from expanding Mary Elizabeth, but could delay that expansion. (VII 2790-2792, 2796-2797).

When a decision by the North Carolina Supreme Court

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[10] The evidence at trial amply demonstrated that Denson, while serving as legal counsel to the MCC, the state agency empowered to grant or deny petitioner's Certificate of Need, went beyond her official duties and actively conspired with respondents to oppose petitioner's Certificate of Need application. (*E.g.*, VII 2689-2690, 2702).

[11] Because respondents were able to subvert the review and comment process of the Central Planning Council and the MCC's procedures, petitioner's application was pending before the MCC for 241 days before it was granted. (VII 2789, 3029-3040). In contrast, Rex's Certificate of Need application, which was filed with the MCC *after* petitioner filed its application, was granted by the MCC in only 67 days. (VII 2759-2772, 2804-2808).

in an unrelated action invalidated the North Carolina Certificate of Need law,[12] the conspirators turned to their "secondary plan." This plan involved an agreement "to keep down proprietary competition" by having co-conspirator Blue Cross impose an arbitrary reimbursement formula upon petitioner in order to make it unprofitable for petitioner to expand Mary Elizabeth.[13] (VII 2855).

These concerted efforts by respondents and their co-conspirators prevented completion of petitioner's new hospital until 1977.[14]

Based upon these facts, all of which were supported by substantial evidence at trial, a twelve person jury in Raleigh, North Carolina returned a unanimous verdict for petitioner for approximately $2.4 million before trebling.

D. **The Fourth Circuit's Decision.**

The Fourth Circuit reversed the jury verdict for the

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[12] The Supreme Court of North Carolina held that the Certificate of Need law was contrary to the state constitution because it (1) constituted a deprivation of liberty without due process of law, (2) established a monopoly in the existing hospitals, and (3) granted existing hospitals exclusive privileges. *See In re Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973).

[13] Blue Cross limited reimbursement to petitioner to a formula based on an artificially low, fixed percentage of equity. (III 1192-1193, IV 1496-1497). Not-for-profit hospitals, such as Rex and Wake Memorial, were reimbursed at a much higher rate calculated on actual charges. Blue Cross also refused to recognize any of petitioner's rate increases for reimbursement purposes, but accepted all of the requests for rate increases made by Rex and Wake Memorial. (I 352-353; VII 2860-2872).

[14] Petitioner introduced extensive evidence (which respondents did not controvert with any evidence of their own) that respondents' conspiracy caused a 51-month delay in the construction of petitioner's new hospital, and the jury awarded damages based on that delay. *See* 691 F.2d at 689-90, Appendix A at 17a-20a, and P-1432.

petitioner on its claims under §1 and §2 of the Sherman Act and ordered a new trial on certain aspects of those claims.[15] In so ruling, the Fourth Circuit created a novel "affirmative defense" to the *per se* violations which petitioner proved respondents committed.

The Fourth Circuit reached these results as follows:

(1) The entirety of the Fourth Circuit's reasoning was based on its acknowledgement that petitioner proved, to the satisfaction of the jury, two *per se* violations of §1 [16] by respondents: (a) the horizontal market allocation of medical-surgical hospital beds in the Raleigh area and (b) a concerted refusal to deal with petitioner. *See* 691 F.2d at 684, 686, Appendix A at 6a-7a, 12a-13a.

(2) The panel ordered a new trial on these two §1 violations in order to permit respondents to present a unique affirmative "rule of reason" defense to their *per se* violations. Designed to immunize "certain planning activities that would otherwise violate §1,"—and the implementation of those activities as well—691 F.2d at 685, Appendix A at 10a, the "special" rule promulgated by the Fourth Circuit

> is simply that planning activities of private health services providers are not "unreasonable" restraints under §1 if undertaken in good faith and if their actual and intended effects lay within those envision-

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[15] The Fourth Circuit held that petitioner proved it was "prepared" to construct a new hospital in the Raleigh market. The Fourth Circuit did not order a new trial on that issue. 691 F.2d at 690, Appendix A at 20a.

[16] Practices which are *per se* illegal under §1 of the Sherman Act include price fixing, market allocation, group boycotts (*i.e.*, concerted refusals to deal) and certain types of tying arrangements. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

> ed by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities.

691 F.2d at 685, Appendix A at 10a.

(3) This novel "special rule of reason" defense to established *per se* violations of §1 was derived from the Fourth Circuit's own "view" that "the relevant federal health care legislation is in limited derogation of the normal operation of the antitrust laws. . . ." 691 F.2d at 686, Appendix A at 12a. More particularly,

(a) The panel rested its "view" on a reading of various federal laws, including the Hill-Burton Act of 1946 and the Comprehensive Health Planning Act of 1966, that had as their primary purpose the funding of local health care facilities and which, incidental thereto, encouraged certain types of planning. Among the purposes of such legislation, the Fourth Circuit stated, was the prevention of the use of federal funds for the construction of facilities not needed or poorly located and thus the avoidance of duplicative services and facilities. 691 F.2d at 684, Appendix A at 7a-8a.

(b) While admitting that the statutes it cited were not "altogether clear" on the matter, the panel felt that those statutes "clearly anticipated" and "envisioned" participation by local hospitals and their administrators in the planning and development of health care facilities and services. This type of "envisioned" participation by local health care providers, the Fourth Circuit emphasized, "was merely encouraged and authorized and not mandated" by federal laws. 691 F.2d at 686, Appendix A at 10a. The Fourth Circuit added its own approval to such participation by volunteering that "we think [it] desirable." 691 F.2d at 685, Appendix A at 10a.

(c) From the foregoing "envisioned" participation, the panel deemed that "a very narrow 'rule of reason' is required in order to permit defendants to show, if they can, that participation in certain planning activities that would otherwise violate §1 might not under the circumstances have been an unreasonable restraint on trade." 691 F.2d at 685, Appendix A at 10a. According to the Fourth Circuit, the critical question for the fact-finder was whether the "resources" under consideration by persons who in some fashion engaged in health care "planning" were "needed" to meet the health care requirements of the public. 691 F.2d at 686, Appendix A at 12a.

(4) The Fourth Circuit also held that the respondents were entitled to present an analogous "rule of reason" defense against petitioner's §2 charges and its proof that respondents attempted to monopolize and conspired to monopolize health care facilities in the Raleigh area. In the Fourth Circuit's view, respondents could immunize themselves from §2 violations by proving that they "were primarily motivated by intent to avoid a 'needless' duplication of health care resources. . . ." 691 F.2d at 690, Appendix A at 21a. By adopting this "good motives" defense in health care antitrust cases, the Fourth Circuit rejected the traditional §2 "legitimate business purposes" defense used in other areas of antitrust litigation.

(5) The Fourth Circuit also indicated that (a) the petitioner had not offered enough evidence to allow the jury to infer that an assistant state attorney general—who, under normal standards of proof, was clearly shown to have been a participant in respondents' conspiracy—had done anything more than perform her official duties, and (b) the trial court gave certain erroneous and unneces-

sarily broad instructions with regard to the sham exception to the *Noerr-Pennington* doctrine.[17]

REASONS FOR GRANTING THE WRIT

A. The Decision Below That "Relevant Federal Health Care Legislation Is In Limited Derogation Of The Normal Operation Of The Antitrust Laws" Conflicts With Rulings Of This Court.

The Fourth Circuit, after admitting that the matter is not "altogether clear," held that the relevant federal health care legislation in place at the time of respondents' planning activities and respondents' subsequent actions to enforce those "plans" were "in limited derogation of the normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. That "derogation" was founded upon the Fourth Circuit's perception that certain statutes "envisioned[,] . . . encouraged and authorized" participation by local health care providers in the local planning of health facility expansion. The Fourth Circuit conceded, however, that such participation was "not mandated." 691 F.2d at 686, Appendix A at 10a.

Although the Fourth Circuit couched its reasoning in terms of "derogation," its decision necessarily provides that certain private conduct, *i.e.*, so-called "health care planning," is actually *immune* from application of settled antitrust principles, including the *per se* doctrine. Simply put, the Fourth Circuit's holding cannot be squared with the principle repeatedly announced by this Court that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear

[17] The Fourth Circuit addressed these issues in the context of "additional issues raised by the parties that are relevant to a new trial," 691 F.2d at 687, Appendix A at 13a, but did not rule that the trial court committed reversible error on these points.

repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975). *See also National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). Just a few weeks ago, the Court took pains to re-emphasize this principle, noting "that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 103 S.Ct. 1011, 1016 (1983). In contrast, the Fourth Circuit here has relied upon an open-ended, amorphous "envisionment" of federal health care legislation to construct a statutory scheme which was, in the Fourth Circuit's words, in "derogation" of the antitrust laws.

Specifically, the Fourth Circuit's use of its "envisionment" test directly conflicts with this Court's application of the "clear repugnancy test" to health care planning activities in *National Gerimedical*, 452 U.S. at 388-89.[18] In *National Gerimedical*, this Court could find no "clear repugnancy" between the antitrust laws and federal statutes which actually established a "statutory scheme" for health care planning.[19] The indicia of non-repugnancy

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[18] The petition for certiorari in *National Gerimedical* relied heavily on this Court's decision in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) ("*Hospital Building Co. I*"), and upon petitioner's subsequent jury verdict. *See* excerpts from the petition for certiorari in *National Gerimedical* which are reproduced as Appendix D. Indeed, the petition in *National Gerimedical* accurately pointed out that the lower court's decision in *National Gerimedical* would effectively undo the decision in *Hospital Building Co. I* by shielding conduct from antitrust scrutiny "not by the statutory interstate commerce hurdle but rather by a much more amorphous blanket exemption tenuously based on planning." Appendix D at 28a.

[19] *National Gerimedical* dealt with "planning" under the National Health Planning and Resources Development Act of 1974, 42 U.S.C.

between the antitrust laws and the federal health care legislation in *National Gerimedical* and the instant case are strikingly similar:

National Gerimedical	Instant Case
1. The defendants' challenged action "was neither compelled nor approved by any governmental, regulatory body." 452 U.S. at 389. Rather, their conduct was a "spontaneous response" to a finding of a local advisory planning body. *Id.*	1. Clearly, the respondents' anti-competitive conduct was neither compelled nor approved by any regulatory body; their acts represented only a "spontaneous response" to petitioner's efforts to construct a new hospital which was not provided for in the conspirators' market allocation scheme.
2. Application of the antitrust laws to the defendant would not "frustrate a particular provision of the [relevant federal statute] or create a conflict with the orders of any regulatory body." 452 U.S. at 390.	2. The Fourth Circuit pointed to no such frustration and conceded that the respondents' challenged actions were "not mandated" by federal law. 691 F.2d at 686, Appendix A at 10a. All it said was that the relevant federal statutes "merely encouraged and authorized," or "envisioned" participation by local hospitals and administrators in the local health facility planning. 691 F.2d at 685-86, Appendix A at 10a.

§§300k-300t-14 (1976 and Supp. IV 1980). That statute, in contrast to the statutes involved in this case, mandated some forms of health care planning. That statute was not, however, enacted until after petitioner filed suit in this case, and it has no relevance to the merits of this action. The Fourth Circuit's decision, however, will clearly enable violators of the antitrust laws to cloak their conduct under the "planning" provisions of various statutes and thus to undermine *National Gerimedical's* holding. *See infra* pp. 22-23.

National Gerimedical	Instant Case
3. There was "no reason to believe that Congress specifically contemplated . . . 'enforcement' [of the local planning agency's decisions] by private insurance providers, let alone relied on such actions to put 'teeth' into the noncompulsory local planning process." 452 U.S. at 391.	3. The Fourth Circuit cited no federal statutory provision giving local hospitals and administrators enforcement powers with respect to the allocation of local health facilities.

The Fourth Circuit's decision pointed to footnote 18 in *National Gerimedical* as support for its view that the statutes it cited were in "derogation of normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. Such a construction constitutes, we submit, a complete misreading of that footnote. Although this Court did state that some health care activities *regulated* by federal law might require a degree of "antitrust immunity in other factual contexts," 452 U.S. at 393 n.18, no such factual context exists in this case. None of the "planning" activities of respondents were organized under or conducted pursuant to any of the statutes cited by the Fourth Circuit. Furthermore, it is absurd to suggest, as the Fourth Circuit did, that anti-competitive actions (which actually *subverted* the only statutorily mandated health care planning process involved in this case, *i.e.*, the North Carolina Certificate of Need law) were so integral to what Congress "envisioned" as to merit immunity from the *per se* doctrine. *See* C. Havighurst, *Deregulating the Health Care Industry* 160-79 (1982).

It is apparent, therefore, that footnote 18 in the *National Gerimedical* opinion has provided an opportunity,

quickly seized upon by the Fourth Circuit, for that court to impose its own particular "view" as to which conduct is subject to "normal operation of the antitrust laws." 691 F.2d at 686, Appendix A at 12a. We submit that such an opportunity will not be ignored by other courts and that this Court should restate the plain meaning of footnote 18, *i.e.*, that *National Gerimedical* was not intended to encompass each and every aspect of the interplay between health care statutes and the antitrust laws.

Before the Fourth Circuit's opinion becomes precedent for protecting other *per se* illegal conduct that courts find "desirable," this Court should firmly hold that federal laws which merely "envision" and "encourage" local participation in the planning process are "not so incompatible with antitrust concerns as to create a 'pervasive' repeal of the antitrust laws as applied to every action taken in response to the health-care planning process." *National Gerimedical*, 452 U.S. at 393. In *National Gerimedical*, as here, "there was no specific conflict between the [federal act] and the antitrust laws . . . ." *Id.* Where there is no such conflict, this Court has made clear that the normal antitrust concepts, including the *per se* doctrine, remain fully applicable in the health care industry. *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2476 (1982).

B. The Fourth Circuit's New "Special Rule Of Reason" Will Create Conflicts And Confusion In Established Antitrust Doctrines.

The new affirmative good faith defense which the Fourth Circuit labelled a "special rule of reason" can only breed conflicts and confusion. This novel theory will, if not cor-

rected, significantly undercut the chief purpose of the *per se* rule—certainty. Furthermore, the theory of a good faith defense establishes an entirely new category of antitrust analysis which is neither *per se* nor rule of reason but rather a hybrid never sanctioned by this Court. Finally, it is internally inconsistent—there cannot be a *per se* offense whose commission can be protected because it is thought to be "reasonable" or to have been done in "good faith."

(1) The Fourth Circuit has exceeded the bounds of established antitrust analysis by allowing a defendant to interpose a good faith or "rule of reason" defense to a conceded *per se* violation of §1 of the Sherman Act. Good motives or "reasonableness" justifications for *per se* violations of §1 have never been tolerated by this Court. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457 (1941).[20] The Fourth Circuit's decision in this case dismissed these authorities and held that the good faith or good intentions of respondents could somehow justify or excuse their *per se* violations of §1. While the Fourth Circuit believed that its new standard "involve[d] only a modest practical modification of the *per se* rule," 691 F.2d at 686, Appendix A at 12a, that court's unique formulation—which for the first time injects "good faith" into the framework by which even the most pernicious restraints of trade are to be assessed—is clearly an ominous dilution of the *per se* concept under §1.

[20] *See also* L. Sullivan, *Handbook of the Law of Antitrust*, §71 at 194 (1977) ("There is an implacable logic in condemning conduct on the basis of ill effects regardless of benign purposes. It is, in the end, effects—impacts upon the competitive process—which are of social consequence . . . . When competitive processes are or will be stifled by particular conduct, it is small comfort that those engaging in it have other ends in view.")

(2) The Fourth Circuit further undercut established antitrust precedent by injecting new elements into the raditional rule of reason approach.[21] In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), this Court articulated two clear principles with regard to the rule of reason: (a) "the purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of members of an industry," *Id.* at 692; (b) "[u]nder [the rule of reason], the inquiry is confined to a consideration of impact on competitive conditions." *Id.* at 690. Instead of confining the rule of reason to inquiry into the anti-competitive consequences of a restraint, as mandated by *Professional Engineers*, the Fourth Circuit's decision requires fact-finders to determine the "desired" amount of competition in a market, which in this case would require an evaluation of whether petitioner's planned expansion was in fact "needless" duplication of existing resources. *See* 691 F.2d at 685-86, Appendix A at 10a-12a. Thus, the "special rule of reason" compels the fact-finder to substitute its determination of what constitutes adequate or "needful" competition for the free and open functioning of the marketplace. Such a standard misapprehends the purpose and application of the rule of reason, and repudiates this Court's holding in *National Society of Professional En-*

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[21] "[T]he 4th Circuit . . . chose . . . to blaze new trails in the Rule of Reason wilderness. . . . Such a 'defense' surely is not consistent with the 'rule of reason' analysis so emphatically limited in *Professional Engineers*, nor with the hoary notion that good motives will not save otherwise illegal conduct from condemnation under the Sherman Act." Sims & McDonald, *Antitrust Concepts Difficult to Apply to Health Care*, Legal Times, Dec. 20, 1982, 16, 19.

gineers. This cannot be the law.[22]

(3) The Fourth Circuit's decision cannot be reconciled with this Court's decision in *Maricopa County Medical Society*, 102 S.Ct. 2466. Further, it ignores other recent decisions by this Court, including *Hospital Building Co. I*, 425 U.S. 738.[23] These decisions establish a clear body of law, which the Fourth Circuit ignored, that apply the antitrust laws to the health care industry just as those laws apply to other segments of the economy.

In *Maricopa*, this Court emphasized, in the context of a horizontal maximum fee price-fixing conspiracy, that the *per se* test applied in the health care industry to all "practices which the courts have heretofore deemed to be unlawful in and of themselves." 102 S.Ct. at 2473 n.15, 2477. Although the Fourth Circuit recognized that horizontal market allocation schemes and concerted refusals to deal are *per se* violations of the antitrust laws, it nevertheless purported to distinguish *Maricopa* on the grounds that "the instant case does not involve price-fixing." 691 F.2d at 684 n.3, Appendix A at 6a n.3. Such reasoning, we submit, misses the whole point of *Mari-*

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[22] The Fourth Circuit rested its finding of an implied repeal of the antitrust laws solely upon a determination that some type of planning by health care providers was "encouraged and authorized" by federal legislation. 691 F.2d at 684-86, Appendix A at 10a. Thus, "[w]hat the 4th Circuit did . . . was to blur the concepts of implied repeal and rule of reason, and reach a result which is true to neither." Sims & McDonald, *supra* note 21, at 19.

[23] *See also Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Nat'l Gerimedical*, 452 U.S. 378; *American Medical Ass'n v. F.T.C.*, 102 S.Ct. 1744 (1982); *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540 (1982); *Union Labor Life Ins. Co. v. Pireno*, 102 S.Ct. 3002 (1982); and *Jefferson County Pharmaceutical Ass'n*, 103 S.Ct. 1011.

copa.[24] There can be no principled distinction under §1 between the horizontal price-fixing conspiracy in *Maricopa* and the horizontal market exclusion scheme and the concerted refusal to deal in this case.

This Court held in *Maricopa* that *per se* rules apply in the health care industry. It is essential that a reaffirmation of this principle be clearly communicated to all lower courts so that further attempted deviations from *Maricopa* do not occur.

(4) The Fourth Circuit departed from this Court's holding that any significant change in application of the Sherman Act should come from Congress, not the federal judiciary. *See National Society of Professional Engineers*, 435 U.S. at 689 ("the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition . . . is properly addressed to Congress. . . .") *See also Maricopa County Medical Society*, 102 S.Ct. at 2477. Thus, the Fourth Circuit's decision departs from this Court's application of the separation

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[24] The Fifth Circuit's decision in *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3649 (U.S. March 7, 1983), concluded, based upon *Maricopa*, that tying agreements in the health care industry, as in other industries, were *per se* illegal and did not provide for any opportunity to excuse such conduct through an affirmative defense. The petition for certiorari in *Hyde* did not challenge this aspect of the Fifth Circuit's decision. *See* Petition, No. 82-1031, at 4 n.3 (filed Dec. 17, 1982). The United States' amicus brief in support of the petition also does not question this holding by the Fifth Circuit, but rather acknowledges that proven "*per se* rules under the Sherman Act are applicable to the health care industry as to other industries." Brief of the United States as Amicus Curiae at 4 n.6. Indeed, the aspects of the *Hyde* decision that are before this Court on certiorari involve consideration of the nature and extent of tie-ins and do not call into question whether the *per se* rules of the antitrust laws apply to the health care industry.

of powers doctrine in the antitrust field.

(5) The Fourth Circuit recognized a defense under §2 of the Sherman Act which paralleled the novel defense it created for §1 claims. Although the jury was properly charged that it must find that respondents had the "specific intent" to monopolize in order to be held liable for attempting or conspiring to monopolize under §2, *see* Appendix E at 30a, 32a, the Fourth Circuit held that respondents should have been allowed to prove that they had a particular type of good motive—the intent to avoid the " 'needless' duplication" of competitive health care facilities—in order to evade liability under §2. Accordingly, the Fourth Circuit found erroneous the trial judge's charge that good motives were not a defense to violations of §2. 691 F.2d at 690, Appendix A at 21a.

This Court has long held that §2 is directed against attempted monopolization where the requisite "intent and the consequent dangerous probability" of obtaining a monopoly both exist. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). Similarly, this Court has held that §2 forbids conspiracies to monopolize where the conspirators acquired or maintained the power to exclude competition from the market and had the specific intent and purpose to exercise that power. *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

On proper instructions from the trial judge (*see* Appendix E), the jury found that respondents had intended to obtain a monopoly and therefore had violated §2. However, under the new defense recognized by the Fourth Circuit, respondents may now be able to avoid liability by showing that, although they clearly intended to monopolize, their intent was "good," because they wished

to avoid the alleged " 'needless' duplication" of competitive facilities.[25] The Fourth Circuit's new §2 defense allows a defendant to escape liability under the Sherman Act even if all of the elements of a §2 violation are proven by the plaintiff. Thus, the defense created by the Fourth Circuit impermissibly inhibits antitrust enforcement under §2. That defense should be repudiated.

C. The Fourth Circuit's Decision Raises New Issues Of National Importance Under The Sherman Act.

(1) Although the Fourth Circuit's decision appears to apply the "special rule of reason" (rather than either the *per se* standard or the traditional Rule of Reason) only to health care planning cases, its analysis cannot rationally be confined to the context of the health care industry.

At least twenty-three federal statutes (dealing with a wide variety of federal concerns other than health care) provide federal funding for some sort of state or local

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[25] The Fourth Circuit analogized the defense to violations of §2 which it created to the often recited rule that specific intent may not be inferred where the defendants' activities are motivated by legitimate and proper business considerations. 691 F.2d at 690, Appendix A at 21a. The Fourth Circuit's new defense, however, operates differently and has much broader implications than the rule concerning legitimate and proper business considerations. A finding that a defendant's anti-competitive conduct is motivated by legitimate and proper business considerations simply precludes the conclusion that the defendant intended to destroy competition. Accordingly, the "legitimate and proper business considerations" rule can be explained as an effort to protect an intention to prevail over one's rivals by legitimate means. *See* 3 P. Areeda & D. Turner, *Antitrust Law* §822a (1978). In contrast, the Fourth Circuit's newly recognized defense is not concerned with the protection of proper means of competition. Rather, it protects all forms of anti-competitive conduct—no matter how pernicious—which are employed to limit competition to an arbitrarily defined "needed" amount of competition.

"planning" activity or "regulate" entry into a market by a competitor.[26] If the Fourth Circuit's decision is left unreviewed, blatantly anti-competitive conduct, which is carried out by persons purportedly engaged in "planning" under any of those statutes, could be protected from application of the *per se* test. Thus, the Fourth Circuit's decision has the far-ranging potential to undercut the *per se* test as a tool for antitrust enforcement. Such a development would impose significant new burdens on the federal judiciary in countless antitrust cases.[27]

For this reason, the Fourth Circuit's opinion raises major issues of national concern under the antitrust laws. Whether *any type* of "planning" should be judged under a special rule of reason because *some* "planning" is "*envisioned*" is squarely presented in this case. To wait for the Fourth Circuit's confusing, aberrational test to be considered by other lower courts will prolong and imperil antitrust enforcement in all situations where "planning" is even arguably "envisioned" by a federal statute.

(2) Even if the Fourth Circuit's decision is confined to the health care industry, that decision is still of national importance to enforcement of the antitrust laws. Antitrust cases involving the provision of health care have increased as the health care sector of our economy has grown in relative and absolute terms.[28] Because of the

[26] These statutes are listed in Appendix F.

[27] The *per se* test was fashioned by this Court, in part, to relieve the time consuming burden of permitting every defendant to justify anti-competitive conduct as somehow being "reasonable." *See Northern Pacific Ry.*, 356 U.S. at 5, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); L. Sullivan, *Handbook of the Law of Antitrust* 193 (1977).

[28] For example, in 1975, only 16 decisions in antitrust/health care cases were reported; by 1981, that number had almost quadrupled to 61. These statistics were obtained through a LEXIS search. *See also*

growing importance of health care/antitrust law, this Court, we submit, should make it clear that, in the absence of Congressionally mandated protection, there is no "planning" defense to hard core *per se* violations of §1.

Under current federal health planning statutes,[29] "planning" is carried out by health systems agencies ("HSAs"), quasi-governmental agencies that are partially funded by the federal government, and by State Health Planning and Development Agencies. There are more than 200 HSAs in the United States, each with jurisdiction over a particular geographic area.[30] HSAs receive, on the average, over 6000 applications from health care providers each year.[31] Each of these applications presents the possibility for anti-competitive conduct similar to that suffered by petitioner at respondents' hands. In order to prevent other abuses of these processes and to preclude future market allocation schemes undertaken in the name of "planning," it is time, we respectfully submit, for this

Halper, *The Health Care Sector and the Antitrust Laws: Collision Course*, 49 Antitrust L. J. 17-18 (1980) pointing out that health care expenditures now constitute 9% of our gross national product and that five times more health care antitrust cases were brought between 1975 and 1980 than between 1890 and 1975.

[29] The National Health Planning and Resources Development Act of 1974, as amended, 42 U.S.C. §§300k - 300t-14 (1976 and Supp. IV 1980). The effect of these statutes on application of the antitrust laws to health care planning was discussed by this Court in *National Gerimedical*, 452 U.S. 378. These statutes were enacted after petitioner's complaint was filed and have no application to the merits of this case. Certainly, however, cases which do involve the 1974 statute and amendments thereto will be considered under the Fourth Circuit's test if that decision is allowed to stand.

[30] *See* J. Simpson & T. Bogue, *The Guide to Health Planning Law* xx (1982).

[31] HRA-45, Data Systems Table No. 2, John Gold, Director, Department of Health and Human Services, Division of Regulatory Activity. In 1981, 1980 and 1979 there were, respectively, 6410, 7005 and 4771 applications to HSAs.

Court to rule firmly that federal health care planning legislation does not "envision" or "encourage" naked restraints of trade or protect such practices from the *per se* doctrine.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: April 6, 1983

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1134

HOSPITAL BUILDING COMPANY,
Appellee,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES; RICHARD URQUHART, JR.,
Appellants,

NORTH CAROLINA HOSPITAL ASSOCIATION and THE STATE OF NORTH CAROLINA,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Herbert Maletz, District Judge.

Argued: November 2, 1981 Decided: October 19, 1982

Before HALL, PHILLIPS and CHAPMAN, Circuit Judges.

Ray S. Bolze (Mark W. Pennak, Ronald K. Perkowski, Howrey and Simon; Thomas W. Steed, Jr., Noah H. Huffstetler, III, Allen, Steed and Allen, P.A. on brief) for Appellants; John K. Train, III (Frank G. Smith, III, Leah J. Sears-Collins, Alston, Miller & Gaines; Charles Gordon Brown; John R. Jordan, Jr., Jerry S. Alvis, William M. Trott, Young, Moore, Henderson & Alvis on brief) for Appellee; (W. C. Harris, Jr., Harris, Cheshire,

Leager & Southern on brief) for Amicus North Carolina Hospital Association; (Rufus L. Edmisten, Attorney General of the State of North Carolina, William F. O'Connell, Special Deputy Attorney General, Robert L. Hillman, Assistant Attorney General on brief) for Amicus Curiae The State of North Carolina.

CHAPMAN, Circuit Judge:

This appeal is from a $7.3 million dollar treble damages judgment against appellants Trustees of Rex Hospital, Joseph Barnes and Richard Urquhart, Jr. The judgment was entered after a six week jury trial in the District Court for the Eastern District of North Carolina. The jury returned a verdict for appellee Hospital Building Company ("HBC") on its claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[1]

Appellants seek reversal of the judgment below on grounds that: (1) the district court applied an incorrect *per se* rule of antitrust liability; (2) appellants' opposition to HBC's certificate of need application is protected from antitrust liability under the *Noerr-Pennington* doctrine; (3) HBC failed to prove "antitrust damages" or to establish that the alleged antitrust violations proximately caused HBC's alleged injuries; and (4) HBC was not prepared to enter the Raleigh, North Carolina area in-patient services market in 1972. Appellants urge this court to remand the action for entrance of judgment notwithstand-

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[1] This matter is before us for a second time. HBC's action was initially dismissed for failure to state a claim affecting interstate commerce. A panel of this court affirmed. Dismissal was upheld again on rehearing *en banc*, *Hospital Building Company v. Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975). The United States Supreme Court granted certiorari, 423 U.S. 820 (1975), and reversed, ruling that the complaint alleges a restraint of trade substantially affecting interstate commerce. 425 U.S. 738 (1976).

ing the verdict or, in the alternative, to remand for a new trial.

I

HBC is a proprietary North Carolina corporation organized in 1946 to operate Mary Elizabeth Hospital in Raleigh, North Carolina. Rex Hospital is a non-profit hospital established in Raleigh in 1840. The trustees of Rex Hospital are appointed by the Raleigh City Council. At all times relevant to HBC's claims, Joseph Barnes was the chief executive officer of Rex Hospital and Richard Urquhart, Jr. was vice-chairman of the Board of Trustees of Rex Hospital.

HBC offered evidence that appellants met with representatives of Blue Cross/Blue Shield Association of North Carolina and others in October of 1970 and conspired to discourage proprietary competition in the North Carolina in-patient health services market. HBC's proof shows that in 1969 Rex and Wake Memorial Hospitals organized an *ad hoc* committee of 26 Raleigh citizens to study the need for in-patient health services in the Raleigh area. It is HBC's position that the committee, officially known as the Joint Long-Range Hospital Planning Committee of Wake County ("Joint Committee"), was controlled by representatives of Rex Hospital, Wake Memorial Hospital and Blue Cross/Blue Shield.

A national proprietary hospital chain, Charter Medical Corporation, acquired HBC in December of 1970. Shortly thereafter Charter Medical announced plans to expand Mary Elizabeth Hospital, proposing either to enlarge it, or perhaps to build a new, much larger hospital elsewhere in Raleigh.

In May of 1971, the Joint Committee issued its report on the demand for hospital services in the Raleigh area. The report recommended that by 1980 Wake Memorial

should expand from 340 to 540 beds and that Rex Hospital build a new 500 bed hospital to replace its then existing facility. The report also contemplated HBC expanding Mary Elizabeth from 40 to 60 beds.

On July 21, 1971, the North Carolina Legislature enacted a certificate of need law, requiring persons to obtain state agency approval of any expansion of in-patient facilities prior to commencing construction of the new facility. On November 1, 1971 HBC filed an application to replace the existing 49 bed Mary Elizabeth Hospital with a new 140 bed general proprietary hospital.[2]

HBC asserts it proved that the co-conspirators formulated a primary and a secondary plan for halting HBC's plans to expand Mary Elizabeth Hospital. The primary plan, HBC asserts, was to kill the planned expansion by keeping HBC from receiving a certificate of need for construction of its new hospital. The secondary plan HBC attempted to prove was imposition of a discriminatory reimbursement schedule to reduce HBC's profits.

HBC's application for a certificate of need was initially referred to the Health Planning Council of Central North Carolina ("Central Planning Council"). HBC offered evidence that appellants, with the aid of the chairman of the Central Planning Council, were able to dominate the council and subvert it to their own purposes. The Central Planning Council denied HBC's application on Janaury 5, 1972.

HBC appealed the Central Planning Council's decision to the North Carolina Medical Care Commission ("MCC"), where HBC asserts that Rex, Blue Cross/

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[2] Mary Elizabeth Hospital apparently had 49 beds when the application was filed. The Joint Planning Committee proceeded on the assumption that Mary Elizabeth had only 40 beds.

Blue Shield, the Central Planning Council, and others conspired to have the MCC reject the application. The application, according to HBC, met all the criteria for issuance of the desired certificate of need. When the MCC granted HBC's application on May 5, 1972, HBC asserts that the conspirators saw that they could not secure rejection of HBC's application. The primary plan of opposing expansion of proprietary hospital services then shifted from an attempt to secure rejection of the application to attempts to tie up the application administratively in hopes that a series of administrative delays would kill the planned expansion.

The Central Planning Council successfully petitioned for a rehearing before the MCC. On June 30, 1972 the MCC reaffirmed its decision to grant HBC's application. On July 28, 1972 the Central Planning Council appealed the MCC's decision granting the certificate of need to the Wake County Superior Court. This appeal was mooted on January 26, 1973 when the North Carolina Supreme Court struck down the North Carolina certificate of need law as violative of the state's Constitution.

After the certificate of need law was declared unconstitutional, HBC claims the co-conspirators shifted to a secondary plan of frustrating HBC's attempts to construct a new hospital. This plan, HBC argued, involved imposition of a discriminatory reimbursement formula on HBC and another proprietary hospital operating in North Carolina. Under this alleged plan, Blue Cross/Blue Shield limited the amount of insurance reimbursement proprietary hospitals received.

HBC claims that the delay engendered by the co-conspirator's primary plan and the later discriminatory reimbursement prevented it from starting construction on the

new hospital until 1977. At trial HBC was awarded damages for profits lost due to delay in the opening of the hospital, increases in construction costs over the period of the delay and increases in equipment costs over the period of the delay.

II

Under current antitrust standards, certain recurring business practices, "because of their pernicious effect on competition," are considered illegal *per se* under the Sherman Act. *See e.g., United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972) and *North Pacific R. Co. v United States*, 356 U.S. 1, 5 (1958). On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." In lieu of such a broad interpretation of § 1, the Supreme Court adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. *United States v. Topco Associates, Inc., supra*, at 606-07. The practical difference between a *per se* offense and a rule of reason offense is that under the *per se* rule, anticompetitive impact of the alleged offense is presumed, while under the rule of reason, its anticompetitive impact must be proven. *Arizona v. Maricopa County Medical Society*, 50 U.S.L.W. 4687 (1982).[3] The violations HBC asserts it proved in this case—horizontal market allocation scheme and a concerted refusal to deal—are generally *per se* violations

[3] The United States Supreme Court decided the *Maricopa County* case after argument in this matter had been heard. We recognize that *Maricopa County* applies the *per se* rule to allegations of price fixing in the health care industry. Unlike *Maricopa County* the instant case does not involve price fixing. Furthermore, the limited application given the rule of reason in this case is justified on much different and narrower grounds than those discussed in *Maricopa County*.

of the antitrust laws. *United States v. Topco, supra;* and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Federal and state laws, enacted at the time the instant antitrust violations are alleged to have occurred, indicate that governmental authorities considered oversupply of health care services and maldistribution of in-patient health care facilities as substantial roadblocks to more cost effective operation of the health services market. In an effort to contain these costs, both state and federal authorities advocated state and local health care planning.

Congressional action on health care planning and control originated with enactment of the Hill-Burton Act of 1946, Pub. L. No. 79-725, 60 Stat. 1049 (1946) (codified in scattered sections of 5, 8, 14, 24, 31, 33, 42, 46, 48 and 49 U.S.C.) (1976). The program initiated by the Act was designed to alleviate deficiencies in the supply and distribution of health care facilities. The Act provided state agencies with an initial grant to survey and study hospital needs, with federal funds thereafter made available to participating states to construct, expand or modernize according to the survey.

By the mid-1960's Congress had become more concerned with oversupply of hospital services in specific localities. In 1964 it amended the Hill-Burton Act to provide fifty percent of the cost of comprehensive regional, metropolitan area, or other local area plans for coordination of existing and planned health care facilities. Hospital and Medical Care Facilities Amendments of 1964, Pub. L. No. 88-443, § 318, 78 Stat. 447 (1964) (codified in 42 U.S.C. §§ 247c, 291-291o) (1970 and 1976). This funding was intended to prevent construction of facilities "which are not needed or are poorly located" and to avoid

"the unnecessary duplication of services and facilities." S.Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964).

In 1966 Congress enacted the Comprehensive Health Planning Act, Pub. L. No. 89-749, 80 Stat. 1180 (1966) (codified in 42 U.S.C. §§ 242g, 243, 246 and 247a) (1976). This act encouraged state and local planning agencies to draw plans for development of health care facilities, to review federal grants for health services and to participate in the planning and development of health care needs. The act required the state to:

> (d) provide for encouraging cooperative efforts among governmental *or nongovernmental* agencies, organizations and groups concerned with health services, facilities, or manpower, and for cooperative efforts between such agencies, organizations, and groups . . . in the fields of education, welfare, and rehabilitation. (emphasis added). § 314(a)(2)(D) (codified in 42 U.S.C. § 246(a)(2)(b)) (1976).

The House Report stated that approved state plans "must provide for cooperative efforts among governmental *or nongovernmental* health agencies and groups" upon pain of losing federal funding. H.R. No. 2271, 89th Cong. 2d Sess. at 12 (1966) (emphasis added).

As noted above, the North Carolina legislature enacted a certificate of need law on July 21, 1971. 1971 N.C.Sess. Laws. Ch. 1164 § 90-289. In 1972, Congress enacted the § 1122 amendments to the Social Security Act. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) (codified in scattered sections of 42, U.S.C.) (1976). The thrust of these amendments was to require a determination of need for any proposed health facilities prior to construction. Reimbursement under medicare and medicaid was conditioned on approval of the new construction.

According to appellants, the above enactments "established a 'public policy contemplating' that the Health Planning Council, the defendants and other persons concerned with health care, participate in precisely the sort of planning efforts engaged in by the Committee." Appellants argue that since these planning activities fell "within the scope and purposes" of federal legislation, the activities were exempt from the antitrust laws.

None of the above mentioned health planning legislation contains an express exemption from the antitrust laws. Therefore, any exemption from the antitrust laws must be implied. As the Supreme Court recently noted in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 425 U.S. 378, 388-89 (1981):

> The antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); see *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399 (1978). "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720 (1975); see *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

HBC argues that none of these enactments "provides for self-regulation by the hospital industry." While these acts do not mandate participation by local hospitals or their administrators, participation by private health care

providers is clearly anticipated and we think desirable. It would be wasteful, and potentially impossible to engage in local health care planning without drawing on the expertise of local hospital administrators and physicians.

We think a very narrow "rule of reason" is required in order to permit defendants to show, if they can, that participation in certain planning activities that would otherwise violate § 1 might not under the circumstances have been an unreasonable restraint on trade. The appropriate rule, we find, is simply that planning activities of private health services providers are not "unreasonable" restraints under § 1 if undertaken in good faith and if their actual and intended effects lay within those envisioned by specific federal legislation in place at the time of the challenged activities as desirable consequences of such planning activities. *See, Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963).

The scope and purpose of such legislation must, of course, be determined in order to apply this rule of reason since it must be given to the trier of fact as the benchmark by which reasonableness of conduct is to be gauged. This is a question of law—of statutory interpretation—for the courts, and because it is properly before us on this appeal, it is appropriate for us to decide it for application in further proceedings in this case.

The type and extent of participation in planning by health care providers that Congress envisioned in the statutes relied upon by defendants here is not altogether clear, but it is clear that what was envisioned was merely encouraged and authorized and not mandated. *See*, Hospital and Medical Facilities Amendments of 1964, *supra;* S. Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964); Partnership for Health Amendments of 1967, Pub. L.

No. 90-174, 81 Stat. 533 (1967) (codified in scattered sections of 42 U.S.C.) (1970 and 1976); S. Rept. No. 724, 90th Cong., 1st Sess. 3 (1967); Heart Disease, Cancer, Stroke & Kidney Disease Amendments of 1970, Pub. L. No. 91-515, 84 Stat. 1297 (1970) (codified in scattered sections of 42 U.S.C. (1976); H. Rept. No. 91-1297, 91st Cong., 2d Sess. 12 (1970); Medical Facilities Construction & Modernization Amendments of 1970, Pub. L. No. 91-296, 84 Stat. 336 (1970) (codified in scattered sections of 12, 21 and 42 U.S.C.) (1970 and 1976); and S. Rept. No. 92-657, 91st Cong., 2d Sess. 13 (1970). This suggests a fairly narrow interpretation of the range of the conduct that may properly be given an effect in derogation of normal operation of the antitrust laws. *Cf. National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.18 (1981); *Silver v. New York Stock Exchange, supra.*

So construing the statutory authorization relied upon here we find it runs only to good faith participation in planning activities aimed at avoiding the needless duplication of health care resources in an affected area. *See e.g.*, Hospital and Medical Facilities Amendments of 1964, *supra*, and S. Rept. No. 1279, 88th Cong., 2d Sess. 3 (1964). Obviously it cannot be interpreted to allow the blanket use of "planning" as a means by which some health care providers act to avoid competiton by others for any other purpose and on any other justification. *See Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738 (1976). Specifically we hold that "planning" under this special rule of reason is not "reasonable" if its purpose or effect is only to protect existing health care providers from the competitive threat of potential entrants into or expanders within the same "market."

The critical question in application of this rule is likely always to be whether the "duplication of resources" sought to be avoided by planning—almost inevitably a feature of any planning activity challenged by an outsider seeking entry or an insider seeking expansion—is in fact "needless" duplication. Proper application of the rule requires that whether it is "needless" or "needful" be gauged by the fact-finder in relation to the health care needs of the consumer public in the market area at the time in question, objectively assessed, and not in relation to the economic or other needs of the "planners", either objectively or subjectively assessed.

Because on this view the relevant federal health care legislation is in limited derogation of the normal operation of the antitrust laws, we further think that the burden of proof to show reasonableness of challenged planning activities under this special rule of reason should be allocated as an affirmative defense to defendants seeking on this ground to avoid antitrust liability. On this basis a claimant, such as plaintiff here, makes out a prima facie case by showing acts that, but for the health care planning legislation, would constitute a *per se* violation of § 1 under traditional antitrust principles. This establishes liability for appropriate damages unless the defendants then persuade the trier of fact by a preponderance of the evidence that their planning activities had the purpose (and effect if plaintiff proves anticompetitive effects) only of avoiding "needless" duplication of health care resources under the objective standard of need above defined.

While this affirmative defense is concededly a narrow one that may be thought to involve only a modest practical modification of the *per se* rule applied below, defendants are entitled in further proceedings to have it

applied to the extent the evidence on retrial may justify. Accordingly, we find that the judgment below for HBC must be reversed and the case remanded for a new trial applying the above rule of reason rather than a strict *per se* basis of antitrust liability.[4] Since the matter must be retried, we now address the additional issues raised by the parties that are relevant to a new trial.

III

Appellants dispute whether the illegal conduct allegedly attributable to them falls within the so-called sham exception to *Noerr-Pennington* antitrust immunity.[5] HBC asserts it offered proof: (1) that appellants, aided by the chairman of the Central Planning Council, appropriated the powers of the council, effectively denying HBC meaningful access to the Central Planning Council; (2) that appellants engaged in spurious litigation before the MCC and the Wake County Superior Court to further the conspiracy by delaying approval of HBC's application for a certificate of need; (3) that appellants suborned the neutrality of an assistant attorney general of North Carolina assigned to act as counsel for the MCC; and (4) that appellants made numerous misrepresentations to government officials in their efforts to defeat HBC's application.

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[4] Appellants also seek a new trial on their counterclaims for abuse of process and libel. Since appellants have asserted no error with respect to the trial of these issues, and since the retrial of the antitrust issues will be sufficiently complicated without introducing these additional issues, judgment for HBC on appellants' counterclaims is affirmed.

[5] In *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court established that no violation of the antitrust laws can be predicated upon attempts to influence the passage or enforcement of laws, even if efforts in that regard are based upon anti-competitive motives.

Actions taken to discourage and ultimately prevent competitors from meaningful access to the processes of administrative agencies fall within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-513 (1972). Thus, proof that appellants conspired to bring the chairman of the Central Planning Council and an assistant attorney general into their conspiracy, with the intent to foreclose HBC from meaningful access to the Central Planning Council and the MCC, is within the sham exception to *Noerr-Pennington*. *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253 (D.C.Cir. 1981). In *California Motor Transport Co., supra*, the court stated that when the proof establishes "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused", *Id* at 513, such actions are not entitled to antitrust immunity. As noted in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 482 n.9 (4th Cir. 1980), the critical inquiry with respect to alleged frivolous litigation is whether the challenged litigation is undertaken with intent to interfere directly with a competitor's business. See, *California Motor Transport Co., supra*, at 511. We believe that appellants are not immune from antitrust liability if the proof establishes they were engaged in a baseless appeal to the Superior Court of Wake County with intent to delay approval of HBC's application for a certificate of need and thereby delay its entrance into the Raleigh market.

Appellants raise several objections to Judge Maletz's charge on *Noerr-Pennington* immunity. We agree with appellants that misrepresentations, to fall within the sham exception to *Noerr-Pennington* immunity, must be made with the requisite intent. In these circumstances, for ex-

ample, misrepresentations made with intent to abuse the administrative processes so as to deny HBC meaningful access to the MCC would fall within the sham exception.

At page 27 of its instructions the court says that "conduct in abuse of the adjudicatory or judicial process which is part of a larger conspiracy to restrain trade or to monopolize a market is not immune from the antitrust laws." We are unprepared at this time to approve such an unnecessarily broad definition of the sham exception. As noted above, HBC asserts that it proved a conspiracy to deny it meaningful access to the Central Planning Council and that it proved appellants undertook fruitless appeals solely to delay approval of HBC's application. We find that proof of misrepresentations made with this type of intent clearly falls within the sham exception to *Noerr-Pennington*, but hesitate at this time to rule that any act accompanying a larger conspiracy in restraint of trade, which also may be fairly characterized as "abuse of process," falls within the sham exception. See *Noerr*, *supra*, at 670.

At page 28 of its instructions the court states: "If the courts are used or litigation is filed as part of an overall scheme to attempt to monopolize or exclude competition from the marketplace or otherwise violate the antitrust laws, that conduct does not enjoy antitrust immunity." This charge is erroneous in light of *California Motor Transport Co.*, *supra*, which extends *Noerr-Pennington* immunity to the adjudicatory setting. There is still a sham exception applicable to judicial proceedings, if such proceedings are baseless, repetitive and brought with the intent to abuse the judicial process.

In its capacity as amicus curiae, the State of North Carolina asserts that the district court erred in allowing

the jury to infer that an assistant attorney general was a member of the alleged conspiracy. As noted above, the State of North Carolina has encouraged hospital planning as a mechanism for controlling costs in the in-patient health services market. The attorney general of North Carolina is charged with representing the public interest at hearings before government agencies, including those engaged in health services planning. If an assistant attorney general appears before a government planning agency, a jury should not be allowed to infer that the assistant attorney general was a part of an alleged antitrust conspiracy involving that planning council unless there is some specific evidence the official was not merely performing his or her assigned duties. *Cf.*, *Comfort Trane Air Conditioning Co. v. Trane Co.*, 592 F.2d 1373 (5th Cir. 1979) (affirming a directed verdict on the basis of overwhelming evidence of independent business purpose).

The attorney general of North Carolina asked assistant attorney general Christine Denson to meet with representatives of the Central Planning Council to insure that its witnesses were properly presented at the hearing before the MCC. The Central Planning Council opposed HBC's application for a certificate of need as it was statutorily authorized to do. The evidence indicated that the attorney general's office doubted that the Central Planning Council's participation in the hearing would be effective unless it received assistance from a state attorney. Denson was asked to insure that the MCC's decision was based on a full record. Pursuant to these instructions, Denson offered to assist both HBC and the Central Planning Council in preparing proposed findings of fact. Only the Central Planning Council asked for assistance.

On the basis of this evidence the district court allowed the jury to conclude that Denson participated in the illegal conspiracy. We do not believe that HBC has offered sufficient evidence that Denson was not merely fulfilling her duties as an assistant attorney general and was instead knowingly contributing to the illegal conspiracy by assisting the Central Planning Council in its attempts to prevail before the MCC. Absent more telling evidence, a jury should not be permitted to infer that an assistant attorney general was a participant in an antitrust conspiracy.

IV

Since introduction of the rule of reason into this action changes the standard of liability, the court below will, of course, once again address the issue of proximate cause on remand. Appellants raised the issue of proximate cause in this appeal, and we believe some discussion of this issue will be helpful upon remand.

HBC claims that the damage award it received below was based on the following sequence of events: (1) appellants' opposition to HBC's application delayed construction of the hospital until February 9, 1973, the date the North Carolina certificate of need law was declared unconstitutional; (2) the § 1122 amendments to the Social Security Act further delayed HBC until May 11, 1973, when federal approval under § 1122 was granted; and (3) rising interest rates, other unfavorable financial conditions and Blue Cross/Blue Shield's discriminatory reimbursements prevented HBC from resecuring a line of credit for construction of the new hospital until after its initial line of credit expired in June of 1973. Appellants claim HBC failed to prove "antitrust damages" or to

establish that its alleged damages were proximately caused by the alleged antitrust violations.

Turning first to the proximate cause issue, HBC alleged, and apparently the jury believed, that appellants had initially attempted to prevent HBC from receiving a certificate of need and later, after it became apparent that the MCC was going to grant HBC a certificate of need, that appellants attempted to delay the granting of the certificate of need by engaging HBC in further proceedings before the MCC and in an appeal before the Wake County Superior Court. An obvious motivation of such delaying tactics is the hope that during the interim, an unforeseen occurrence will discourage or prevent the opposing party from realizing its plans. Appellants can hardly claim to have been surprised in this case by two intervening acts, Congressional enactment of the § 1122 amendments to the Social Security Act and the interest rate increases. These could have prevented HBC from beginning construction until 1977. Accordingly, we reject the appellants' contentions that these occurrences were intervening causes of the damages and that a jury could not find that the damages flowed from the alleged antitrust violations.[6]

The concept of "antitrust injury" is derived from the decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, a company manufacturing and supplying bowling equipment acquired several bowling centers. A number of competing bowling centers brought an action against the manufacturer and supplier alleging a violation of § 7 of the Clayton Act. The injuries

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[6] This ruling, of course, does not relieve HBC of the burden of proving that appellants' attempts to delay construction of the new hospital were violative of the Sherman Act under the rule of reason.

claimed by the plaintiffs were lost profits that would have been realized by the plaintiffs if the manufacturer had not purchased the bowling centers but instead had allowed them to go out of business as the plaintiffs alleged they would.

What made the acquisition of the bowling centers arguably unlawful under the antitrust laws was the manufacturer's potential to use its admittedly overpowering financial resources to undercut the competing bowling center, a so-called "deep pocket" offense. Since plaintiffs had no evidence that the manufacturer and supplier had attempted to undercut them, plaintiffs could prove no damages flowing from the alleged illegality and were left to assert loss of profits that would have accrued to their benefit had the competing bowling centers been allowed to go out of business.

The Supreme Court found these alleged lost profits were not injury of the type that the violated antitrust law was designed to prevent and they were not damages of the type that the claimed violations would be likely to cause.[7] Appellants, in the instant appeal, assert that the damages HBC seeks in this action flow from enactment of § 1122 and from rising interest rates rather than from the alleged unlawful acts of appellants. We reject this argument. As was noted in the above discussion of proximate cause, delay in HBC's ability to enter the Raleigh hospital market is precisely the type of injury that the alleged "allocation of the market" and "refusal to deal" were likely to cause and appellants cannot escape liability merely because the injurious delay was compounded by

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[7] See Chief Judge Winter's discussion of the ruling in *Brunswick* in *Lee-Moore Oil Company v. Union Oil Company of California*, 599 F.2d 1299, 1302-1304 (4th Cir. 1979).

enactment of the § 1122 amendments and rising interest rates.

V

Since it is not affected by our ruling on the rule of reason and, thus, will not be addressed again on remand, we also dispose of the issue of HBC's preparedness to enter the Raleigh area hospital market. Appellants contend that the record supports a finding that HBC could not have obtained the approval of North Carolina authorities for its 6.88 acre "Tucker" site and that HBC was not as a matter of law prepared to enter the Raleigh area hospital market in 1972. Entrance of judgment notwithstanding the verdict is not proper since the issue was hotly contested at trial, with considerable evidence being introduced to support both positions. We also believe that the question of whether to send a special interrogatory to the jury on this issue was within the discretion of the trial judge. *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976).

VI

Although the issue was not raised in the briefs, at argument, HBC asserted the verdict below should be sustained even assuming the rule of reason applies to its § 1 claims. In support of this assertion HBC argued that any error in applying a *per se* rule to its § 1 cause of action did not render objectionable its recovery under its § 2 causes of action.

Section 2 of the Sherman Act supports three distinct causes of action: (1) monopolization, (2) attempt to monopolize and (3) conspiracy to monopolize. HBC sought recovery under the latter two causes of action,

attempt and conspiracy. The district court correctly charged that an element of both of these offenses is specific intent to monopolize. *American Football League v. National Football League*, 205 F.Supp. 60, 64-65 (D.Md. 1962), *aff'd* 323 F.2d 124 (4th Cir. 1963).

Proof that the transactions in question were primarily motivated by legitimate business purposes rather than by specific intent to monopolize is a defense to both attempt to monopolize and conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953), and *American Football League, supra* at 132-33.

A literal application of the legitimate business purposes defense, developed in more traditional commercial market cases, does not, however, readily lend itself to application by a jury to health care planners. The analogous defense, and the one appellants should be permitted to pursue below, is one like that we have formulated for § 1 claims. Proof that the defendants in this action were primarily motivated by intent to avoid a "needless" duplication of health care resources would be a defense to HBC's § 2 claims. In the instant case the district court charged the jury that "it is no defense to a . . . conspiracy to monopolize and an attempt to monopolize that the acts complained of may have been undertaken with what defendants believe to be proper motives. A claim of good motives cannot justify or excuse a violation of the antitrust laws, and would be no defense in this case."

We believe the charge is clearly erroneous in light of the defendants' right to prove that they were motivated by intent to avoid "needless" duplication rather than specific intent to monopolize. Defendants made a timely objection to this charge and argued on brief that the § 2 as well as

the § 1 causes of action should be reversed. Plaintiffs § 2 causes of action, therefore, are reversed.

Accordingly, judgment for HBC on appellants' counterclaims is affirmed; judgment for HBC on its claims under §§ 1 and 2 of the Sherman Act is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

(Filed January 7, 1983, U.S. Court of Appeals
Fourth Circuit)

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-1134

HOSPITAL BUILDING COMPANY,
Appellee,

versus

TRUSTEES OF THE REX HOSPITAL,
a Corporation; JOSEPH BARNES;
RICHARD URQUHART, JR.,
Appellants,

NORTH CAROLINA HOSPITAL ASSOCIATION,
Amicus Curiae.

ORDER

Upon consideration of the appellee's petition for rehearing en banc and the appellants' motion to assess costs on appeal against appellee;

No judge having requested a poll on the suggestion for rehearing en banc, it is ADJUDGED and ORDERED that the petition for rehearing and the motion for costs are both DENIED.

Entered at the direction of Judge Chapman for a panel consisting of Judge Hall, Judge Phillips and Judge Chapman.

For The Court,

/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX C

(Filed August 18, 1980, J. Rich Leonard, Clerk,
U.S. District Court, Eastern North Carolina)

United States District Court

FOR THE

Eastern District of North Carolina

CIVIL ACTION FILE NO. 4048

HOSPITAL BUILDING COMPANY *vs.* TRUSTEES OF THE REX HOSPITAL, a Corporation; JOSEPH BARNES and RICHARD URQUHART, JR.	JUDGMENT

This action came on for trial before the Court and a jury, Honorable Herbert N. Maletz, United States Customs Judge Presiding by designation, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff Hospital Building Company recover of defendants Trustees of Rex Hospital, Joseph Barnes and Richard Urquhart, Jr., jointly and severally, treble damages in the sum of Seven Million Three Hundred Twenty Thousand Ninety and NO/100 Dollars ($7,320,090.00), plus costs of suit including reasonable attorneys' fees to be determined by the court at a later date.

It is further adjudged that defendant Trustees of Rex Hospital recover nothing on its counterclaims for abuse of legal process and libel and that these counterclaims be and hereby are dismissed.

Dated at Raleigh, North Carolina, this 18th day of August, 1980.

/s/ J. RICH LEONARD
Clerk of Court
J. Rich Leonard, at the direction
of Judge Herbert N. Maletz

I certify the foregoing to be a true
and correct copy of the original.
J. RICH LEONARD, Clerk
United States District Court
Eastern District of North Carolina

By /s/ SUSAN DEAN
Deputy Clerk

APPENDIX D

EXCERPTS FROM PETITION FOR CERTIORARI IN *NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER V. BLUE CROSS OF KANSAS CITY*

C. If allowed to stand, the decision below will impair the effect of recent decisions of this Court subjecting the health care industry to antitrust scrutiny.

Until very recently, health care providers and insurers were largely immune from the federal antitrust laws because of various legal hurdles which effectively shielded their conduct from antitrust scrutiny. *See, e.g.*, C. Havighurst, "Professional Restraints on Innovation in Health Care Financing," 1978 *Duke L.J.* 303, 343 (1978). Recent decisions of this Court have, however, greatly diminished these barriers.

First, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, this Court rejected the contention that the "learned professions" are exempt from the requirements of the antitrust laws.

Second, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum Co.*, 445 U.S. 97, and predecessor cases,[14] this Court significantly narrowed the *Parker* v. *Brown* [15] "state action" exemption, which now provides only a limited shield for private actions ostensibly taken by health professionals and third party insurers in response to state law and regulatory regimes. *See, e.g.*, *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d

[14] *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579; *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773. *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350; *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 439 U.S. 96.

[15] 317 U.S. 341.

530, 549-50 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075, 1079 (4th Cir. 1976), *cert. denied*, 430 U.S. 922. Certainly after *Midcal* it is clear that private acts undertaken without state supervision are not exempt from antitrust scrutiny.

Third, and with special relevance to the health care industry, are this Court's recent decisions dealing with the scope of interstate commerce to which Section 1 of the Sherman Act (15 U.S.C. § 1) applies. For some time, hospitals and other health care providers have been able to contend successfully that the delivery of health services was a local activity, and, hence, not subject to the antitrust laws.[16] In *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, however, this Court significantly broadened the scope of interstate commerce in antitrust scrutiny of the health professions and other health care providers. The scope of interstate commerce under the Sherman Act was further extended by this Court's more recent decision in *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232.

The decision below would effectively undo this Court's decision in *Rex Hospital*. Like the present case, *Rex Hospital* involved private anticompetitive conduct ostensibly undertaken pursuant to health planning legislation. Under the present decision, the very conduct in *Rex Hospital* ultimately held on remand to have been in violation of

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[16] *See, e.g., Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199, 1210 (E.D. Mich. 1973) (no interstate commerce in suit by private hospitals against Blue Cross for revocation of participating hospital contract because "sale of hospital care is personal and localized in nature").

the antitrust laws,[17] would be shielded from antitrust scrutiny—this time not by the statutory interstate commerce hurdle but rather by a much more amorphous "blanket" exemption tenuously based on the Planning Act.

The decision below would also significantly limit the impact of this Court's decision in *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205. In the past, antitrust suits against Blue Cross/Blue Shield were often held to be barred by Section 2 of the McCarran-Ferguson Act (15 U.S.C. § 1012), which exempts the "business of insurance" from the Sherman Act if such business is regulated by state law.[18] In *Royal Drug*, this Court, noting that "exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences" (440 U.S. at 232, n. 40), concluded that pharmacy provider agreements were not within the McCarran-Ferguson Act exemption. Yet, the court below has rendered such agreements and all their surrounding circumstances totally exempt from antitrust scrutiny. The impact of this decision on other related McCarran-Ferguson Act issues, such as those involved in *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir.

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[17] On August 18, 1980, a judgment for plaintiff in the amount of $7,320,090 was entered on a jury verdict in the *Rex Hospital* case. Post-judgment motions have been filed by defendants.

[18] *See, e.g., Travelers Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), *cert. denied*, 414 U.S. 1093; *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir. 1977), *cert. denied*, 434 U.S. 860; *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 431 F. Supp. 5 (E.D. Pa. 1975), *aff'd per curiam*, 557 F.2d 1001 (3d Cir. 1976). *See also St. Bernard Hospital* v. *Hospital Service Ass'n of New Orleans*, 618 F.2d 1140 (5th Cir. 1980) (reversing lower court opinion holding participating hospital agreements immune from antitrust scrutiny in light of *Royal Drug*).

1980), is less clear, but is not likely to be favorable to antitrust plaintiffs.

In short, the recent decisions of this Court have uniformly had the effect of narrowing the traditional antitrust exemptions applicable to health care providers and insurers.[19] What the opinion below does is to create a new blanket "Planning Act exemption" at least as broad as the antitrust exemptions traditionally used by health care providers and insurers (such as Blue Cross) to shield their conduct from antitrust scrutiny. Unless this Court's recent decisions are to be severely undercut, review of the decision below is required.

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[19] This has been consistent with the general inclination of this Court to read antitrust exemptions narrowly and to require a clear showing of Congressional intent before finding conduct exempt from antitrust scrutiny. *See, e.g., St. Paul Fire and Marine Ins. Co.* v. *Barry*, 438 U.S. 531; *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816.

APPENDIX E

EXCERPTS FROM THE RECORD OF THE DISTRICT COURT PROCEEDING

Plaintiff's Claims Under Section 2 of the Sherman Act

We next turn to plaintiff's claims that in violation of Section 2 of the Sherman Antitrust Act, the defendants have attempted to monopolize and have conspired to monopolize the market for medical-surgical hospital services in the Raleigh area. These are two separate claims.

"Monopolize" Defined

"Monopolize" means the acquisition of power to exclude actual or potential competitors from the market. It does not necessarily mean that one business controls an entire market. A monopoly may be shared between two or more businesses.

Essential Elements of Claim for Attempted Monopolization

In order to sustain an action against defendant Rex Hospital under Section 2 of the Sherman Act for attempted monopolization, plaintiff must prove by a preponderance of the evidence each of the following elements:

First, that the defendant Rex Hospital had a specific intent to monopolize interstate trade and commerce in medical-surgical hospital services in the Raleigh area;

Second, that one or more of the acts claimed by plaintiff to have been done was wrongful, and was in furtherance of that intent, even though insufficient actually to produce the intended monopoly;

Third, that both elements—the intent and the act—must appear and must together result in a reasonable probability that monopolization will sooner or later occur;

Fourth, that the attempted monopolization so established was the proximate cause of damage to the business or property of plaintiff.

"Attempt to Monopolize" Defined

The term "attempt to monopolize," as used in the Federal antitrust laws, involves two essential elements: (1) an intent to monopolize, and (2) some act done in furtherance of that intent, even though insufficient actually to produce the intended monopoly. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a reasonable probability that monopolization will sooner or later occur.

However, in order to constitute an "attempt to monopolize," it is not necessary that the acts have actually resulted in monopolization or the exclusion of competitors.

Intent Defined

"Purpose or intent" means the state of mind with which one acts. A person is usually held to intend to do everything such person does in fact do. It is also reasonable to infer that a person intends all the natural and probable consequences of his acts.

Intent—Proof of

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

Essential Elements of Claim for Conspiracy to Monopolize

There are four essential elements which the plaintiff must prove in order to establish its claim that defendants conspired with others to monopolize within the meaning of Section 2 of the Sherman Act:

1. That there was a conspiracy between defendants and others to monopolize an appreciable amount of identifiable interstate commerce in the furnishing of medical-surgical hospital services in the Raleigh area;

2. That if so, both the defendant and the others entered into such conspiracy with the specific intent to monopolize that commerce;

3. That one or more of the acts claimed by the plaintiff in its complaint was done; and was in furtherance of such conspiracy to monopolize;

4. That if so, the conspiracy so established was the proximate cause of damage to the business or property of plaintiff.

"Conspiracy to Monopolize" Defined

A "conspiracy to monopolize" means an agreement or understanding between two or more parties to acquire the power to exclude actual or potential competitors from the market.

Ignorance of Antitrust Laws or Good Motives No Defense

The fact that the defendants may have believed, in good faith, that what was being done was lawful is not a

defense in this case. Every person is charged with knowing what the law forbids.

Similarly, it is no defense to a conspiracy in restraint of trade, conspiracy to monopolize and an attempt to monopolize that the acts complained of may have been undertaken with what defendants believe to be proper motives. A claim of good motives cannot justify or excuse a violation of the antitrust laws, and would be no defense in this case.

APPENDIX F

FEDERAL STATUTES WHICH INVOLVE PLANNING OR WHICH REGULATE MARKET ENTRY*

	Statutory Provision	Common Name Or Heading	Description
1.	7 U.S.C. §§3701-3703 (Supp. V 1981)	Agricultural Subterminal Facilities Act of 1980.	Authorizes grants to assist states in the development of plans for subterminal facilities.
2.	10 U.S.C. §2391 (Supp. V 1981)	Military base reuse studies and community planning assistance.	Authorizes grants in connection with planning the closure of military installations and related community adjustments.
3.	12 U.S.C. §27 (1976 & Supp. V 1981)	Certificate of authority to commence banking.	Regulates entry into banking.
4.	15 U.S.C. §717f (1976 and Supp. V 1981)	Construction, extension, or abandonment of [natural gas] facilities.	Predicates transportation or sale of natural gas upon issuance of a certificate of public convenience and necessity by the Federal Energy Regulatory Commission.

*In addition to these provisions, research on LEXIS reveals 216 statutory subsections pertaining to public health and welfare planning.

Statutory Provision	Common Name Or Heading	Description
5. 16 U.S.C. §797(e) (1976)	Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. [under the Federal Power Act.]	Provides for the issuance of licenses to persons constructing or operating dams, reservoirs, or other project works related to the transmission of hydroelectric power.
6. 16 U.S.C. §1225 (1976)	State consideration of protection and restoration of estuaries in State comprehensive planning and proposals for financial assistance under certain Federal laws; grants: terms and conditions, prohibition against disposition of lands without approval of the Secretary.	Relates to the protection and restoration of estuaries in connection with state and local governments' comprehensive planning and proposals for financial assistance under certain federal statutes.

	Statutory Provision	Common Name Or Heading	Description
7.	16 U.S.C. §2107 (Supp. V 1981)	Financial, technical, and related assistance to states [under the Cooperative Forestry Assistance Act of 1978].	Authorizes the Secretary of Agriculture to make funds available to non-federal landowners in connection with certain forestry assistance programs and requires the Secretary to use forest resources planning committees at the national and state levels in order to implement a technology program.
8.	20 U.S.C. §1016 (Supp. V 1981)	Federal discretionary grants [pertaining to continuing post secondary education program and planning].	Provides for the issuance of grants to public and private institutions and organizations after the state entity responsible for the comprehensive planning of certain educational programs has had an opportunity to comment on the relationship of the proposed grant to such planning.
9.	23 U.S.C. §134 (1976 & Supp. V 1981)	Transportation planning in certain urban areas.	Provides for the development of transportation plans and programs and financial assistance in connection with the development of coordinated transportation planning.

	Statutory Provision	Common Name Or Heading	Description
10.	23 U.S.C. §307 (1976 & Supp. V 1981)	Research and planning [in connection with federal-aid highways.]	Authorizes the Secretary of Transportation to (1) engage in transportation research in cooperation with, *inter alia*, profit or non-profit corporations and (2) make available funds for the planning of future highway programs.
11.	29 U.S.C. §771 (1976 & Supp. V 1981)	Grants for construction of rehabilitation facilities, staffing, and planning assistance.	Authorizes grants to public or non-profit agencies, institutions, or organizations to assist them in meeting the cost of planning rehabilitation facilities; makes such grants dependent upon the pertinent state agency's approval of the application.
12.	29 U.S.C. §819 (Supp. V 1981)	Prime sponsor's planning council.	Requires designated units of local government to establish a planning council to participate in the development of a comprehensive employment and training plan and requires the planning council to take into consideration any comments and recommendations of a private industry council.

	Statutory Provision	Common Name Or Heading	Description
13.	38 U.S.C. §§5051-5057 (1976 & Supp. V 1981)	Sharing Of Medical Facilities, Equipment, And Information.	Authorizes the Administrator of Veterans' Affairs to enter into agreements with medical schools, hospitals, and research centers in order to share medical techniques and information; authorizes grants in connection with planning and carrying out such agreements.
14.	43 U.S.C. §§422a-422*l* (1976 & Supp. IV 1980)	Construction Of Small Projects [under the Federal Reclamation Laws.]	Provides federal assistance, for purposes of planning and developing water resource projects, to organizations which have the capacity to contract with the United States under the Federal Reclamation Laws.
15.	46 U.S.C. §841b (1976)	Licensing of ocean freight forwarders.	Regulates entry into the business of ocean freight forwarding.
16.	47 U.S.C. §214 (1976)	Extension of lines or discontinuance of service; certificate of public convenience and necessity.	Regulates telephone and telegraph common carriers; requires any carrier that is constructing or extending a line to obtain from the FCC a certificate that the present or future public convenience and necessity require or will require that line.

	Statutory Provision	Common Name Or Heading	Description
17.	47 U.S.C. §301 (1976)	License for radio communication or transmission of energy.	Authorizes the FCC to license and otherwise regulate—as public convenience, interest or necessity requires —the transmission of energy or communications or signals by radio.
18.	49 U.S.C. §1607 (Supp. IV 1980)	Long-range planning and technical studies.	Authorizes grants to states and local public bodies and agencies for the planning and evaluation of public transportation projects; requires the development of transportation plans programs which "encourage to the maximum extent feasible the participation of private enterprise."
19.	49 U.S.C. §1612 (1976 & Supp. IV 1980)	Planning and design of mass transportation facilities to meet special needs of the elderly and the handicapped.	Authorizes grants and loans to state and local governmental bodies and agencies and to private non-profit corporations for the planning and provision of certain transportation services.

	Statutory Provision	Common Name Or Heading	Description
20.	49 U.S.C. §1713 (1976 & Supp. IV 1980)	Planning grants.	Authorizes grants for the planning of airport systems to certain agencies authorized by the laws of states or political subdivisions of states.
21.	49 U.S.C. §10901 (Supp. IV 1980)	Authorizing construction and operation of railroad lines.	Predicates the construction and operation of a new railroad line upon the issuance of a certificate of public convenience and necessity from the ICC.
22.	49 U.S.C. §10922 (Supp. IV 1980)	Certificates of motor and water common carriers.	Regulates transportation by motor common carrier or water common carrier by requiring that a carrier obtain an authorizing certificate from the ICC.
23.	49 U.S.C. §10923 (Supp. IV 1980)	Permits of motor and water contract carriers and freight forwarders.	Provides for the regulation of transportation by motor contract carriers or water contract carriers and of services by freight forwarders by requiring a person who seeks to provide such transportation to obtain an authorizing permit from the ICC.